BEFORE THE WORKERS COMPENSATION APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KERRI C. McGAHEY	)	
Claimant	)	
V.	)	
	)	
SECURITY BENEFIT GROUP, INC.	)	Docket No. 1,047,895
Respondent	)	
AND	)	
	)	
CHUBB INDEMNITY INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and insurance carrier (respondent), by and through Jeff Bloskey, of Overland Park, request review of Administrative Law Judge Brad E. Avery's June 11, 2014 Award. John M. Ostrowski, of Topeka, appeared for claimant. The Board heard oral argument on October 7, 2014.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument, the parties agreed the Board may consult the AMA *Guides*[1] (hereinafter *Guides*). The parties also agreed Dr. Gilbert's impairment rating was not in conformance with the *Guides*.

ISSUES

Claimant sustained a July 30, 2009 injury to her left ankle while ascending stairs on respondent's premises. The judge found claimant sustained personal injury by accident arising out of and in the course of her employment. The judge awarded permanent partial disability benefits for claimant's left lower extremity after accounting for preexisting functional impairment.

Respondent requests the Award be reversed, arguing claimant failed to prove her accident arose out of and in the course of her employment. Respondent asserts claimant's accident is not compensable because it was caused by a personal risk, not an increased risk of employment. Respondent also argues claimant's injury and disability are not compensable because they were the result of an activity of day-to-day living. Claimant maintains the Award should be affirmed.

---

[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based on the fourth edition of the *Guides*.

The issues for the Board's review are:

1. Did claimant sustain personal injury by accident arising out of and in the course of her employment?

2. What is the nature and extent of claimant's disability?

3. Is claimant entitled to future and unauthorized medical care?

FINDINGS OF FACT

Claimant began working for respondent as a customer service associate in March 2000. Her job duties include answering calls and processing appointments and commission statements. Claimant also occasionally tests computer systems and trains individuals.

This claim involves a July 30, 2009 accident. Claimant had a preexisting left ankle condition. On April 15, 2005, claimant fell on stairs at work and suffered severe fractures to multiple bones in her left ankle. Brett Wallace, M.D. operated on claimant's left ankle. Fairly extensive hardware, including two plates and 13 screws, was surgically placed in her ankle. Claimant had a resulting workers compensation claim, which she settled in May 2006 for an 11% functional impairment to the left lower extremity based on a rating from Phillip L. Baker, M.D., in which he used the *Guides*. In October 2006, the hardware was removed, with the exception of an embedded pin. Claimant had no permanent work restrictions as a result of her 2005 accidental injury.

There is no evidence claimant had additional medical treatment for her left ankle until her 2009 accident. She had sought renewal of a handicap placard, which Dr. Wallace denied on February 8, 2007, but he was willing to advise respondent that claimant would qualify for closer parking if it were available. Claimant sent Dr. Wallace's office a May 29, 2007 fax in which she indicated walking about one-half mile from her parking spot at work to her desk would leave her "in tears."[2] Dr. Wallace suggested claimant be able to park within 200 yards of respondent's building.

Claimant testified that between October 2006 and July 30, 2009, she did not experience any problems with her left ankle and was not in pain, but did have "a little bit of swelling at times"[3] with extended walking. Claimant testified she was able to walk, exercise and ride her bicycle. Claimant also testified that because of her prior ankle injury, she holds stair handrails wherever she may be, both at work and in public.

---

[2] Gilbert Depo., Ex. 2 at 50.

[3] P.H. Trans. at 10.

On July 30, 2009, claimant used an electronic badge to enter respondent's premises. She was heading to her desk to begin the work day. The only item she was carrying was her purse. She began ascending the employee-only stairway most convenient and closest to her second floor desk. Claimant testified she used such stairs maybe twice a day – once to go to her desk and once to go back down.[4] The stairway consisted of an initial set of 15 stairs followed by a landing and then a second set of 15 stairs going up the opposite direction. The stairs have a rubberized surface for traction. Claimant testified she was walking as she would normally walk, with the exception of being on stairs. She was holding the handrail with her right hand. After reaching the landing, claimant took a step with her right foot and sharply pivoted to her right to ascend the second set of stairs. When she pivoted to make the right turn, she shifted her weight to her left foot. When doing so, she felt her left ankle snap or pop. She did not fall. She testified there was no defect in the floor, she did not trip over anything and she did not stumble or step on any foreign object on the stairs. Claimant's injury occurred on the landing between the stair flights.

Claimant testified that her turning to go up the second set of stairs was performed more sharply than if she were turning a corner outside respondent's building, such as if she were out shopping. She also testified she had to make a sharper turn to ascend the stairs at work than outside of work because the stair landing at work is small and would not allow her to take multiple steps before ascending the second set of stairs.[5] However, claimant also acknowledged encountering similar stair configurations more than hundreds of times outside of work and negotiated them in the same manner as at work.[6]

Claimant was transported to a Topeka hospital by ambulance. The following day, she came under the treatment of John Gilbert, M.D., who diagnosed her with a left ankle sprain, as well as status post open reduction and internal fixation of the left ankle with mild degenerative disease. Claimant was placed in a walking boot and instructed to perform weight bearing as tolerated. Claimant was released to light duty with restrictions of no lifting above 20 pounds, no stairs and to limit standing and walking to two hours per day.

On September 11, 2009, Dr. Gilbert issued a letter stating:

> I believe that Ms. McGahey's injury represents a sprain, which occurred on July 30, 2009. While her injury does represent a new injury, I believe it represents an exacerbation or aggravation of a pre-existing condition, degenerative arthritis in the Left ankle, which is a sequelae of her previous injury and as such her current injury can be considered a consequence of the injury of 2004.[7]

---

[4] See *id.* at 13.

[5] See R.H. Trans. at 29-30.

[6] See *id.* at 21, 25 and 28.

[7] Gilbert Depo., Ex. 2 at 94. Dr. Gilbert mistakenly refers to the 2005 injury as occurring in 2004.

On October 30, 2009, Dr. Gilbert released claimant at maximum medical improvement to full duty without any restrictions. He recommended continued nonsteroidal anti-inflammatory medicine with possible future surgery. Claimant returned to Dr. Gilbert on November 13, 2009, with a sudden recurrence of pain in her left ankle after sliding up at her desk. Claimant and Dr. Gilbert discussed various treatment options. Dr. Gilbert instructed her to keep wearing her walking boot.

Respondent denied compensability, but claimant sought more medical treatment. At a December 22, 2009 preliminary hearing, claimant testified regarding her accidental injury and her extreme pain, swelling and near inability to walk. She testified a doctor told her that her ankle snapped on July 30, 2009 because of her degenerative arthritis.[8] The day after the hearing, the judge ordered continued medical treatment with Dr. Gilbert.

On February 4, 2010, claimant returned to Dr. Gilbert with continued symptoms. Dr. Gilbert prescribed a double upright brace for claimant to wear while working. Claimant returned to Dr. Gilbert on April 9, 2010, complaining the brace caused a gait disturbance which resulted in back and right knee problems. Dr. Gilbert recommended grinding the heel of the left shoe to try and smooth the gait. He also prescribed a one-half inch heel lift.

On May 13, 2010, claimant was seen for a surgical consultation by Richard Polly, M.D., who suggested non-operative treatment based on risks associated with potential surgeries.[9] Dr. Polly provided a corticosteroid injection and recommended claimant wear an Arizona brace and discontinue use of the double upright brace.

On July 13, 2010, claimant returned to Dr. Gilbert. Dr. Gilbert noted claimant's stance and gait were mildly antalgic. He stated claimant had continued symptoms after her 2005 injury, particularly ambulating rough ground or with prolonged walking. Dr. Gilbert assigned a 15% impairment of the left lower extremity for gait derangement or arthritis pursuant to the *Guides*, but he only found 3% attributable to the 2009 injury and stated:

> I am of the opinion that four-fifths of her impairment, or impairment of the left lower extremity of 12%, is as a result of pre-existing degenerative disease in the left lower extremity following her previous injury, and that one-fifth, or impairment of the left lower extremity of 3%, is as a result of the injury of July 30, 2009.[10]

---

[8] P.H. Trans. at 14.

[9] Gilbert Depo., Ex. 2 at 77.

[10] *Id.*, Ex. 2 at 74. A chart used by Dr. Gilbert indicates the 15% rating is to the whole body, not the lower extremity. (See *id.*, Ex. 4 at 2). A 15% whole body rating converts to a 37% lower extremity rating.

Dr. Gilbert testified on February 15, 2011. Dr. Gilbert opined claimant developed degenerative disease of the left ankle following her injury in 2005, but the stability of her ankle was satisfactory. Dr. Gilbert testified claimant's 2009 injury was the result of claimant's degenerative disease becoming symptomatic because while "falling on the stairs is a common mechanism of injury for an ankle sprain, it usually requires more than simply plant and twist the ankle."[11]

Dr. Gilbert testified:

> Q. . . . Doctor, do you have an opinion as to whether the 2009 event in which Ms. McGahey was involved with her left ankle, whether it would have occurred but for the prior injury in her preexisting condition?
>
> . . .
>
> A. Yes, sir. I believe that but for the previous injury she probably would have been able to ascend the stairs without undue difficulty.
>
> Q. Okay. Your September 2009 letter to JoAnn Kirk also states that Ms. McGahey's current injury can be considered a consequence of the prior injury. Have I read that portion correct?
>
> A. That's correct.
>
> Q. Can you clarify for us what you meant by that statement?
>
> A. Well, I believe that she has an arthritic ankle as a sequelae of the previous injury and that her activities, climbing the stairs and pivoting on the landing, exacerbated symptoms in that arthritic ankle and, as such, would be considered as a consequence or sequelae of the previous injury.
>
> Q. . . . Doctor, do you have an opinion as to whether the 2009 injury involving Ms. McGahey's ankle was the natural and probabl[e] consequence of her prior injury and preexisting condition?
>
> . . .
>
> A. Yes, sir. I believe it is not an uncommon of a sequelae of an injury of that nature.[12]

---

[11] *Id.* at 23.

[12] *Id.* at 13-14.

Dr. Gilbert also testified claimant's degenerative disease caused her to become symptomatic when she planted and twisted her ankle.[13] Dr. Gilbert also testified "[s]tair climbing is a common activity in the activities of daily living for normal people."[14] He also acknowledged people can twist their ankles on stairs even absent a prior ankle surgery or prior ankle fracture.

Dr. Gilbert testified he arrived at his impairment rating using Section 3.2B, Table 36, of the *Guides* dealing with routine use of a short leg, ankle-foot orthosis. Dr. Gilbert indicated he arrived at the same impairment rating using the measurement for arthritis.

On agreement of the parties, claimant was seen by Greg Horton, M.D., a board certified orthopedic surgeon, for a court-ordered independent medical evaluation on February 15, 2011. Claimant told Dr. Horton that her left ankle did well for three years prior to her 2009 injury. Dr. Horton stated:

> Clearly the traumatic arthropathy that she has in her ankle is not related directly to the 2009 injury. This anterior osteophyte has been there for quite some time and is the direct result of her 2005 . . . severe fracture. I would point out that she does have a marked increase in her subjective symptoms since this injury of 2009. That has clearly exacerbated or accelerated her underlying pre-existing condition.[15]

After undergoing a CT scan of her ankle, claimant returned to Dr. Horton on April 26, 2011. The CT scan revealed extensive arthritic change throughout her ankle with the vast majority having been there for "quite some time."[16] Dr. Horton recommended arthroplasty of the ankle, for which he apportioned 80% of such need to her preexisting injury and 20% to the 2009 injury.

On August 5, 2013, claimant was seen at her attorney's request by Edward Prostic, M.D., a board certified orthopedic surgeon. Claimant told Dr. Prostic her left ankle did well until her 2009 injury. Physical examination revealed a one inch decrease in circumference of the left calf as compared to the right, swelling, tenderness over the tendons posterior to the lateral malleolus, and some medial and mild tenderness anterolaterally. Dr. Prostic noted claimant's ankle extended only to neutral with approximately one-third loss of heel inversion and forefoot supination, no weakness to manual muscle testing and satisfactory pulses and sensation. Dr. Prostic assigned a 30% impairment of the left lower extremity pursuant to the *Guides,* with 11% being preexisting. Dr. Prostic recommended either surgical arthrodesis or arthroplasty of the ankle.

---

[13] *Id.* at 24.

[14] *Id.* at 7.

[15] Horton Depo., Ex. 2 at 2.

[16] *Id.*, Ex. 3 at 1.

On September 26, 2013, the judge ordered a neutral IME with Peter Bieri, M.D., who is board certified in impairment and disability determinations. Claimant was seen by Dr. Bieri on January 7, 2014. According to Dr. Bieri, claimant told him she had persistent left ankle discomfort between her 2005 and 2009 injuries. Physical examination of the left ankle revealed: (1) it was two centimeters larger in circumference than the right ankle; (2) moderate medial and lateral joint tenderness; (3) moderate to marked crepitance; (4) no persistent loss of sensation; and (5) slight weakness, self-limited secondary to pain.

Dr. Bieri diagnosed claimant with a left ankle sprain, superimposed on preexisting surgical repair and subsequent acceleration of degenerative joint disease. Dr. Bieri provided claimant with a 20% left lower extremity impairment rating, with 11% preexisting impairment, for a 9% impairment of the left lower extremity pursuant to the *Guides* as a result of the July 30, 2009 accident. Dr. Bieri recommended additional cortisone injection. Dr. Bieri agreed with Dr. Horton regarding apportioning the future responsibility of any ankle surgery between the 2005 and 2009 injuries on an 80/20 basis.

At the March 31, 2014 regular hearing, claimant acknowledged having negotiated stairs with the same configuration before her accident in work and non-work life more than hundreds of times.[17] She testified:

> Q. And before 2000 - - before July 30th, 2009, you had negotiated stairs with the same configuration in other places, correct?
>
> A. I'm sure I have, yes.
>
> Q. Okay. And you've seen - - you had seen stairs in this configuration in public places, businesses, uh, places in your non-work life, agreed?
>
> A. Yes.
>
> Q. And before July 30th, 2009, you had used stairs in this same configuration in your non-work life?
>
> A. Yes.
>
> Q. And before July 30th, 2009, you would ascend these stairs that you would encounter in your non-work life in the same manner, holding on to the stairwell, getting to the midway landing, pivoting and going up the other set of stairs?
>
> A. Yes.[18]

---

[17] See R.H. Trans. at 28.

[18] *Id.* at 21.

Claimant continues to perform her same job without restrictions. She currently experiences pain and swelling in her ankle for which she takes ibuprofen, Advil and Tylenol. She ices her ankle about four times per week. Claimant testified she has difficulty getting to her car, no longer exercises or rides her bike, rarely shops and is affected by weather changes. She denied that these problems existed before her 2009 injury. She has a handicap parking permit because of her left ankle. While acknowledging additional surgery is an option, claimant was concerned more surgery could worsen her pain.

Dr. Bieri testified on April 1, 2014. He reiterated opinions noted above and testified claimant's 2009 accident resulted in an aggravation, acceleration and intensification of her preexisting condition. It was Dr. Bieri's opinion the physical activity claimant was performing at the time her ankle snapped was "a normal activity of day-to-day living."

Dr. Prostic testified on April 7, 2014. Dr. Prostic believed claimant was getting along satisfactorily following her 2005 accident and hardware removal. Following her 2009 accident, claimant complained of significant stiffness and soreness of her ankle which worsened with activity. Dr. Prostic opined claimant sustained a severe sprain that caused acceleration of the osteoarthritis in her ankle.

Dr. Prostic opined the 2009 accident caused a "significant acceleration" in claimant's arthritis. In addressing whether the osteoarthritis from claimant's 2005 injury worsened as a result of natural aging and/or normal activities of day-to-day living, Dr. Prostic testified:

> Well, according to the interpretations of the x-rays in 2009 by the radiologist and by Dr. John Gilbert, there wasn't very much arthritis at that time. So, based upon that, without a new injury superimposed upon the original one, I would have expected very slow progression of osteoarthritis.[19]

Dr. Prostic testified his rating was "largely based upon the radiologic diagnosis that for essentially no joint space, the Guides give 30 percent to the lower extremity."[20] In arriving at his impairment, Dr. Prostic utilized the radiologic chart on the lower extremity, osteoarthritis, on page 83, table 62. Dr. Prostic testified:

> A. Well, going across the ankle row, I gave her credit for zero millimeters, rather than the one millimeter I said in the report.
>
> . . .
>
> Q. Okay. And if we are to utilize, as you said, the ankle joint coming across in Table 62 to the column labeled one millimeter, what would be the rating for Ms. McGahey's ankle?

---

[19] Prostic Depo. at 13.

[20] *Id.* at 10.

A. It would be 20 percent. But there's also a 1-inch decrease in circumference of the left calf, so we can go to Table 37, Page 77.

. . .

And that gives 8 to 13 percent of the lower extremity for the calf atrophy.

. . .

Q. Okay. So, you added additional impairment for the decrease in circumference of the calf?

A. Yeah. And in addition to that, she's got loss of motion of the ankle in the hindfoot. Adding everything together, I thought the 30 percent was the more appropriate number rather than the 20 percent number.[21]

Dr. Horton testified on May 22, 2014. It was Dr. Horton's opinion claimant's arthritis was the direct result of her 2005 severe fracture. Dr. Horton testified:

> Well, her x-rays show arthritis of the ankle. She has what you could refer to as bone spurs around her ankle, particularly on the front. She has narrowing of her joint space with loss of the normal gliding surface or the articular cartilage, so -- that is not a normal process of aging. That is not something that would come about as a result of a tumor or infection or an inflammatory process such as rheumatoid disease or other systemic type of arthritis. The reason for that ankle to be arthritic is as the result of some sort of a trauma.
>
> Now, in people with very long-standing instability of their ankle, they can develop changes over a period of many years. However, when she was initially seen following her injury in 2009, she already had these findings of the bone spurs about her ankle. So my point is that it's not likely they developed between 2009 and 2011 when I saw her. Those arthritic findings were already present in 2009.[22]

Dr. Horton testified claimant's future medical treatment would consist of an ankle fusion, ankle arthroplasty or a replacement, with arthroplasty being his ultimate recommendation based upon claimant's age. Dr. Horton reiterated his opinion that 80% of any future medical treatment would be related to claimant's 2005 accident and 20% to the 2009 accident. Dr. Horton testified that from a medical standpoint, claimant's mechanism of injury would be a normal activity of day-to-day living.

---

[21] *Id*. at 15-16.

[22] Horton Depo. at 10-11.

PRINCIPLES OF LAW

An employer is liable to pay an employee compensation where the employee sustains personal injury by accident arising out of and in the course of employment.[23]

An accident is:

> . . . an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.[24]

K.S.A. 2009 Supp. 44–501(c) states an employee "shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability." The test is not whether the injury causes the condition, but whether an injury aggravates the condition.[25] Even if there is an aggravation of a preexisting condition, a claimant must prove "a relationship . . . between the aggravation and accidental injury arising out of the employment. Causation remains an essential."[26]

"[T]he work[er]'s compensation act prescribes no standard of health for [workers], and where a [worker] is not in sound health but is accepted for employment and a subsequent industrial accident . . . aggravates or accelerates an existing disease, or intensifies the affliction, [the worker] is not to be denied compensation merely because of such pre-existing condition."[27]

"When there is expert medical testimony linking the causation of the second injury to the primary injury, the second injury is considered to be compensable as the natural and probable consequence of the primary injury."[28]

---

[23] K.S.A. 2009 Supp. 44-501(a).

[24] See K.S.A. 2009 Supp. 44-508(d).

[25] See *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 377, 573 P.2d 1036 (1978).

[26] *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 738, 504 P.2d 625 (1972).

[27] *Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 114, 959 P.2d 469 (1998) (quoting *Strasser v. Jones*, 186 Kan. 507, 511, 350 P.2d 779 (1960).

[28] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 516, 154 P.3d 494, *reh. denied* (2007); see also *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972) (". . . every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.").

In *Logsdon*, the Kansas Court of Appeals noted:

> 1. WORKERS COMPENSATION–*Injury as Direct Result of Primary Injury–Question of Fact*. Whether an injury is a natural and probable result of previous injuries is generally a fact question.
>
> 2. SAME–*Injury as Direct Result of Primary Injury–Subsequent Injury Compensable if Primary Injury Arose Out of and In Course of Employment.* When a primary injury under the Worker's Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.
>
> 3. SAME–*Aggravation of Primary Injury for Which Compensation Awarded–Compensation Allowed for Postaward Medical Benefits.* When a claimant's prior injury has never fully healed, subsequent aggravation of that same injury, even when caused by an unrelated accident or trauma, may be a natural consequence of the original injury, entitling the claimant to postaward medical benefits.[29]

The phrases arising "out of" and "in the course of" employment have separate and distinct meanings. Each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[30]

K.S.A. 2009 Supp. 44-508(e) states:

> "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

---

[29] *Logsdon v. Boeing Company*, 35 Kan. App. 2d 79, Syl. ¶¶ 1, 2, 3, 128 P.3d 430 (2006).

[30] *Kindel v. Ferco Rental, Inc*., 258 Kan. 272, 278, 899 P.2d 1058 (1995).

The Board has described K.S.A. 44-508(e) as a codification of *Boeckmann*, supra.[31] The intent of this statute is to avoid paying workers compensation benefits for conditions that result from risks that are solely personal to the worker.

In *Bryant*, the Kansas Court of Appeals considered an appeal from the Appeals Board and issued an unpublished opinion.[32] Mr. Bryant, who claimed low back injuries on March 2, 2003 and May 13, 2003, had a serious prior low back injury in August 1997 when he fell through a wooden boat dock. The 1997 injury required extensive conservative treatment, epidural steroid injections and two spine surgeries. Surgery did not relieve Mr. Bryant's back pain. Additional treatment was required, including 87 chiropractic treatments between July 2000 and February 2003. The chiropractic treatments included seven sessions in February 2003. Mr. Bryant missed significant work in February 2003.

On March 2, 2003, Mr. Bryant was reaching for a tool bag at work when he felt a "pop" or "snap" in his back followed by a severe increase in lower back pain. Mr. Bryant was only able to return to light-duty work and he required a helper. Mr. Bryant again felt an increase in low back pain on May 13, 2003 when he stooped and leaned over to weld.

A court-ordered physician, Vito Carabetta, M.D., opined Mr. Bryant's March 2 and May 13, 2003 incidents were instigating events that pushed him "over the limit." Theodore Sandow, Jr., M.D., noted essentially no change in the physical structure of Mr. Bryant's lower back, based on his comparison of MRI scans performed before and after the claimed injuries in 2003. However, Dr. Sandow testified the two events at work in 2003 aggravated and changed claimant's relatively stable back condition.

The Kansas Court of Appeals observed that neither party presented evidence that Mr. Bryant's injury was the result of normal activities of day-to-day living, but commented that his actions of bending and reaching were arguably just activities of normal day-to-day living, as was standing up in *Johnson*[33] and stooping in *Boeckmann*.[34] The Court held a work injury is not compensable unless it is fairly traceable to the employment. The Court reiterated that workers compensation benefits are reserved for injuries caused by employment risks, but not for workers with preexisting conditions that would likely worsen

---

[31] See, *e.g.*, *Huggins v. Haysville Health Care Ctr.*, No. 1,046,676, 2011 WL 7012245 (Kan. WCAB Dec. 29, 2011); *Ditlevson v. City of Overland Park*, No. 1,027,337, 2007 WL 2296138 (Kan. WCAB July 10, 2007); and *Martin v. CNH America, LLC*, No. 1,022,207, 2006 WL 3598277 (Kan. WCAB Nov. 16, 2006).

[32] *Bryant v. Midwest Staff Solutions, Inc.,* No. 99,913, 2009 WL 744160 (Kansas Court of Appeals unpublished opinion filed March 13, 2009) *rev'd,* 292 Kan. 585, 257 P.3d 255 (2011).

[33] *Johnson v. Johnson County*, 36 Kan. App. 2d 786, 790,147 P.3d 1091, *rev. denied* 281 Kan. 1378 (2006).

[34] *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 738-39, 504 P.2d 625 (1972).

due to activities of day-to-day living. The Court found no evidence that Mr. Bryant's job contributed to his injury nor any evidence of a work-related hazard and that Mr. Bryant did not suffer an injury because his acts of stooping and leaning were normal activities of daily living and the only factor that caused his injury was his "already highly unstable lower back."

Bryant appealed. The Kansas Supreme Court noted the phrase "suffers disability . . . by the normal activities of day-to-day living" as used in K.S.A. 2009 Supp. 44-508(e) is subject to more than one interpretation:

> Under one interpretation, the injury is the result of day-to-day living – say, degeneration of a joint that occurs because of the ongoing strain that is placed on the joint both away from the job and on the job. Under the second interpretation, the injury is the result of the same *kind* of activity that may take place on the job as off the job – say, twisting the body to reach for an object. The syntax of the statute suggests that the former interpretation is correct, in that the wear of day-to-day living resembles the results of the natural aging process and is not like the stress of the worker's usual labor. Our courts have nevertheless at times followed an interpretation closer to the second way of reading the statutory language.[35]

Bryant noted the problems associated with years of inconsistent precedent:

> We cannot discern a consistent principle in these various opinions. Certainly, no bright-line rule emerges from analysis of these cases or from the plain language of the statute. To be sure, twisting or bending over are daily activities, for workers as well as nonworkers. So are lifting objects, cutting pieces of meat, typing on keyboards, and walking and standing for extended periods of time. The Court of Appeals' opinion in the present case tends to remove from the purview of workers compensation protection the many work-related ailments that follow from activities that may also be carried out away from the job.[36]

Bryant states that whether an injury arises out of employment depends on what claimant was doing when injured:

> [T]he proper approach is to focus on whether the injury occurred as a consequence of the broad spectrum of life's ongoing daily activities, such as chewing or breathing or walking in ways that were not peculiar to the job, or as a consequence of an event or continuing events specific to the requirements of performing one's job. "The right to compensation benefits depends on one simple test: Was there a work-connected injury?"
>
> . . .

---

[35] *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 590, 257 P.3d 255, 259 (2011).

[36] *Id.* at 595.

> Even though no bright-line test for whether an injury arises out of employment is possible, the focus of inquiry should be on the [sic] whether the activity that results in injury is connected to, or is inherent in, the performance of the job. The statutory scheme does not reduce the analysis to an isolated movement [–] bending, twisting, lifting, walking, or other body motions [–] but looks to the overall context of what the worker was doing – welding, reaching for tools, getting in or out of a vehicle, or engaging in other work-related activities.[37]

Bryant held Mr. Bryant's injuries were compensable because reaching for a tool belt and bending to weld were not normal activities of day-to-day living.[38]

Among the precedent cited in *Bryant* are *Covert*,[39] *Taber*,[40] *Siebert*,[41] *Boeckmann*, *Hensley*,[42] *Martin*,[43] *Anderson*,[44] *Poff*,[45] *Johnson*, *Heller*[46] and *Brazil*.[47]

In *Covert*, a traveling salesman was injured after someone threw a chunk of mud at the windshield of his car while he was working. The case was not compensable because he was equally exposed to the same risk outside of his employment.[48] *Taber* indicated that to be compensable, a work injury requires a greater risk than what the worker is subjected to outside the employment. *Siebert* states that even where an injury occurs at work, it is not compensable unless it is "fairly traceable to the employment," as contrasted with hazards to which a worker "would have been equally exposed apart from the employment."[49]

---

[37] *Id.* at 596.

[38] *Id.*

[39] *Covert v. John Morrell & Co.*, 138 Kan. 592, 27 P.2d 553 (1933).

[40] *Taber v. Tole Landscape Co.*, 181 Kan. 616, 313 P.2d 290 (1957).

[41] *Siebert v. Hoch*, 199 Kan. 299, 428 P.2d 825 (1967).

[42] *Hensley v. Carl Graham Glass*, 226 Kan. 256, 597 P.2d 641 (1979).

[43] *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, 615 P.2d 168 (1980).

[44] *Anderson v. Scarlett Auto Interiors*, 31 Kan. App. 2d 5, 61 P.3d 81 (2002).

[45] *Poff v. IBP, Inc.*, 33 Kan. App. 2d 700, 106 P.3d 1152 (2005).

[46] *Heller v. ConAgra Foods, Inc.*, No. 96,990, 2007 WL 1814293 (Kansas Court of Appeals unpublished opinion filed June 22, 2007).

[47] *Brazil v. Bank One Corp.*, No. 100,989, 2009 WL 1858722 (Kansas Court of Appeals unpublished opinion filed Jun. 26, 2009), *rev. denied* 290 Kan. 1092 (2010).

[48] *Covert v. John Morrell & Co.*, 138 Kan. 592, 593, 27 P.2d 553, 554 (1933).

[49] *Siebert v. Hoch*, 199 Kan. 299, Syl. ¶ 5, 428 P.2d 825 (1967).

Boeckmann concerned a claimant who had a degenerative hip condition for over a decade. He stooped to pick up a tire at work and became unable to work thereafter. Mr. Boeckmann's injury did not arise out of his employment. The evidence was:

> . . . his employment did not cause his condition to occur; that the hip condition had been a progressive process; . . . that almost any everyday activity has a tendency to aggravate the problem; that every time the claimant bent over to tie his shoes, or walked to the grocery store, or got up to adjust his TV set there would be a kind of aggravation of his condition.
>
> . . .
>
> [E]veryday bodily motions required by claimant's work gradually and imperceptibly eroded the physical fibers of his structure, as the patient drip of water wears away the stone. The examiner found, on what we deem sufficient evidence, that any movement would aggravate Boeckmann's painful condition and there was no difference between stoops and bends on the job or off.[50]

Hensley noted there are three general categories of risks in workers compensation cases: (1) those distinctly associated with the job; (2) risks which are personal to the workman; and (3) neutral risks which have no particular employment or personal character. Mr. Hensley's work placed him on a roof and made him a more accessible and easier target for a sniper. The court viewed this as a neutral risk, but his injury from being shot arose out of and in the course of his employment.

In *Martin*, a claimant with prior back problems who sustained a specific injury on the employer's premises when twisting to get out of a truck did not sustain a compensable injury because his injury was due to a personal risk:

> Considering the history of claimant's back problems, it is obvious that almost any everyday activity would have a tendency to aggravate his condition, i.e., bending over to tie his shoes, getting up to adjust the television, or exiting from his own truck while on a vacation trip.[51]

Martin notes that employment risks are universally compensable, but personal risks do not rise out of the employment and are not compensable.[52] The employer bears the costs of neutral risks, such as an unexplained fall.[53]

---

[50] *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 738-39, 504 P.2d 625 (1972).

[51] *Martin,* 5 Kan. App. 2d at 300.

[52] *Id.* at 299.

[53] See *McCready v. Payless Shoesource*, 41 Kan. App. 2d 79, 81, 88-89, 200 P.3d 479 (2009).

The principle that injuries occurring due to an increased employment risk generally result in compensability was also noted in *Anderson*. In such case, a worker's constant entering and exiting vehicles was an increased employment risk that he was not equally exposed to away from work.[54] In *Poff*, while standing was a normal everyday activity, a claimant's injuries from captive standing for prolonged periods at work was compensable because such work caused the injuries and extended standing was not an act of normal everyday living.[55]

Johnson states, "injuries caused by or aggravated by the strain or physical exertion of work do not arise out of employment if the strain or physical exertion in question is a normal activity of day-to-day living."[56] Injuring a knee while turning in a chair and attempting to stand to reach for an overhead file is not compensable because it is a normal activity of day-to-day living.[57] The claimant in *Johnson* had a significant preexisting knee condition. Her treating doctor testified she "had years of degeneration and . . . it was just a matter of time" and there "wasn't anything particular about the swiveling in her chair that would be anymore likely to [injure claimant] than getting out of a car or getting out of bed or just standing up or anything else."[58]

Heller is similar to *Poff*. K.S.A. 44-508(e) did not prevent compensability of Ms. Heller's knee injuries due to standing and walking on slippery concrete for 8-12 hours per work day. There was medical evidence that Ms. Heller's employment aggravated or accelerated her degenerative knee condition and that her employment exposed her to a risk she was not equally exposed to apart from her employment.

In *Brazil*, a claimant's back injury was not compensable. Ms. Brazil asserted injury from repetitive and extensive sitting, bending or twisting. The Board held Ms. Brazil's allegations of repetitive and extensive bending were not credible. She actually bent or twisted in her chair about once every 15 minutes. Such injury was not compensable because such movements were normal activities of day-to-day living. The facts of *Brazil* were indistinguishable from those in *Johnson*.[59]

As noted above, our Kansas Supreme Court did not discern any consistent principle in the precedent noted in *Bryant*.

---

[54] *Anderson*, 31 Kan. App. 2d at 11.

[55] *Poff*, 33 Kan. App. 2d at 710.

[56] *Johnson*, 36 Kan. App. 2d at 790.

[57] *Id.*

[58] *Id.* at 788.

[59] *Brazil*, 2009 WL 1858722 at *4.

Even subsequent to *Bryant*, the Kansas Court of Appeals held an injury generally does not arise out of employment if it was due to a risk to which the worker was equally exposed outside of work. In *Meyer*,[60] an injury was not compensable where Mr. Meyer fell and broke his femur after feeling pain in his leg while walking to pick up a customer's order. There was no proof he was required to walk at work, either to a greater degree or dissimilar manner, than in his personal life. K.S.A. 44-508(e) precluded compensability.

However, in *Brackett*,[61] the Kansas Court of Appeals noted *Bryant* likely controlled over older cases. The Court stated:

> While the activity which caused Brackett's injury – exiting her personal vehicle – is a common activity in daily life, the overall context in which Brackett was performing the activity convinces us that her back injury is compensable. As the majority found, Brackett's action of opening her car door was connected to, and inherent in, the performance of her job because travel to and from DESI's satellite offices was an integral part of her job duties. Long distance travel was a regular feature of Brackett's employment. There was substantial competent evidence to support Brackett's claim that her back injury resulted from this travel beginning on May 4, 2009, and continuing until her termination. Accordingly, we hold the Board did not err when it found that Brackett's back injury arose out of her employment.

Work activities that "merely ignited pain symptoms that were inevitable" that would have occurred regardless of work, do not result in compensable injuries.[62] An injury does not arise out of employment when a preexisting condition progresses regardless of work:

> Workers compensation should be reserved for persons who are injured on the job due to hazards specifically associated with that particular work, not for persons who come to an employer with a preexisting disease and suffer the inevitable consequences of that disease while they happen to be at work.[63]

In *Martin*,[64] claimant alleged a hip injury from getting under cars, bending, twisting, turning, squatting and stooping at work. Medical testimony established he had avascular necrosis that would deteriorate regardless of his activities, whether at work or when doing day-to-day activities. Mr. Martin did not suffer an injury that arose out of his employment.

---

[60] *Meyer v. Nebraska Furniture Mart*, No. 107,424, 2012 WL 4937629 (Kansas Court of Appeals unpublished opinion filed Oct. 12, 2012).

[61] *Brackett v. Dynamic Educ. Sys.*, No. 108,134, 2013 WL 1339916 (Kansas Court of Appeals unpublished opinion filed Mar. 29, 2013).

[62] *Huggins v. Haysville Healthcare Ctr.*, No. 107,407, 2012 WL 5373389 (Kansas Court of Appeals unpublished opinion filed Oct. 26, 2012), *petition for rev. denied* Dec. 27, 2013.

[63] *Martin v. CNH America LLC*, 40 Kan. App. 2d 342, Syl. ¶ 6, 195 P.3d 771 (2007), *rev. denied* 286 Kan. 1178 (2008).

[64] *Id.*

ANALYSIS

1. Claimant's accidental injury arose out of and in the course of her employment.

Respondent argues claimant's injury did not arise out of and in the course of her employment. Respondent asserts claimant's employment did not place her at any greater risk of injury than she faced away from work, such that her injury is not compensable based on risk analysis. Respondent contends the claim is not compensable under K.S.A. 2009 Supp. 44-508(e) because claimant's injury was the result of normal activities of day-to-day living.

All testifying physicians agreed that claimant's 2009 accidental injury represented an aggravation or acceleration of her preexisting left ankle condition. Similarly, every testifying physician concluded claimant's activity of ascending the stairs was an activity of day-to-day living, but their opinions are not legal conclusions.

An aggravation, acceleration or intensification of a preexisting condition is compensable. Of course, claimant still must prove her worsening arose out of and in the course of her employment.

Claimant was on respondent's premises when her injury occurred, such that her injury was in the course of her employment. An injury occurring at work does not end the discussion on compensability. If being at work is the standard for compensability, the injuries in *Boeckmann*, both *Martin* cases and *Johnson* would be compensable. Here, there is no credible argument claimant's injury was not in the course of her employment.

Claimant's injury also arose out of her employment because it arose from conditions and obligations of her work. While the Board sees no difference between the stair conditions claimant encountered at work and similar stairs she might encounter away from work, such determination is irrelevant. Quite simply, she had to get to the second floor of respondent's building to perform her work. While she could have taken an elevator, she was not precluded from using the stairs. It would have been unreasonable for claimant to use her employment badge to clear respondent's security and subsequently just stand in the building in lieu of proceeding to her desk as required by her work. Getting to her second floor desk was inherent to performing her job.

The Board is duty bound to follow *Bryant*.[65] In analyzing this case, we could disregard older precedent and simply apply the Kansas Supreme Court's approach in *Bryant*, but such approach is debatable because *Bryant* did not overrule prior decisions. The Court had the opportunity to do so, but instead noted it would not be possible to formulate a bright-line test to determine when an injury arises out of employment.

---

[65] See *Gadberry v. R. L. Polk & Co.*, 25 Kan. App. 2d 800, 808, 975 P. 2d 807 (1998).

Using *Bryant*, claimant's injury arose out of her employment. *Bryant* states we should examine whether an injury occurred as a "consequence of an event . . . specific to the requirements of performing one's job." Claimant had to negotiate the stairs to get to her work station. Injury occurring during a work requirement is compensable. *Bryant* also instructs us to not look at isolated movements, such as walking, but to look at the overall context of what the worker was doing when injured. Again, claimant was walking to her work area, which she had to do to perform her job.

Even based on case law applying risk analysis, the Board concludes claimant's ascending stairs is a risk of employment, such that claimant's injury is compensable. An argument can be made that claimant's ankle was injured in 2009 due to her preexisting and personal left ankle condition. Dr. Gilbert testified claimant's 2009 injury was a natural and probable consequence of her 2005 injury and preexisting condition and that "but for" the prior injury, she probably would have been able to ascend the stairs without undue difficulty.[66] However, closer examination of Dr. Gilbert's testimony reveals that claimant's 2009 left ankle condition was rendered symptomatic or was aggravated because of her work activity of ascending the stairs, not simply because she had a preexisting condition.

Moreover, a common theme running through *Boeckmann*, *Johnson* and the two *Martin* cases is that when virtually any activity on or off the job would aggravate a claimant's underlying condition, to the degree that movements away from work were no different than movements at work, an injury at work does not arise out of employment because there is no increased risk due to the employment. Claimant's injury is not analogous to such cases because there was no such medical evidence in this matter. No doctors testified claimant was inevitably going to injure her left ankle and it just happened to occur at work. There is no evidence claimant's ankle gave way or was sprained between 2005 and her 2009 accidental injury or that it caused her to fall in the interim.

The Board concludes claimant's injury arose out of and in the course of her employment and did not result from normal activities of day-to-day living.

2. What is the nature and extent of claimant's disability?

The Board disregards Dr. Gilbert's opinion regarding claimant's impairment because the parties agreed Dr. Gilbert's impairment rating was not in compliance with the *Guides*. The Board concludes claimant has an overall 25% functional impairment involving her left lower extremity based on splitting the 30% and 20% impairment ratings from Drs. Prostic and Bieri. Claimant also has an 11% preexisting functional impairment due to her 2005 accidental injury. She has a resulting 14% functional impairment rating involving her left lower extremity at the level of the lower leg on account of her 2009 accidental injury.

---

[66] Additionally, claimant testified at the preliminary hearing that a doctor told her that her ankle snapped in 2009 because of her degenerative arthritis. (P.H. Trans. at 14). Claimant indicated Dr. Gilbert may have told her that her ankle snapped in 2009 due to her degenerative arthritis, but she was not sure.

3. Is claimant entitled to future and unauthorized medical care?

Yes.

CONCLUSIONS

The Board reaches the following conclusions:

1. claimant's 2009 accidental injury arose out of and in the course of her employment;

2. K.S.A. 2009 Supp. 44-508(e) does not preclude compensation;

3. claimant's 2009 accidental injury resulted in her sustaining a 14% functional impairment involving her left lower extremity at the level of the lower leg; and

4. claimant is entitled to future medical treatment for her 2009 accidental injury.

AWARD

WHEREFORE, the Board modifies the June 11, 2014 Award to increase claimant's functional impairment rating to 14% to the left lower extremity at the level of the leg.

The claimant is entitled to 26.6 weeks of permanent partial disability compensation, at the rate of $439.54 per week, for a total award of $11,691.76 for a 14% loss of use of the left lower leg.

IT IS SO ORDERED.

Dated this _____ day of October, 2014.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: John M. Ostrowski
johnostrowski@mcwala.com
karennewmann@mcwala.com

Jeff S. Bloskey
jbloskey@mgbp-law.com

Honorable Brad E. Avery

DISSENTING & CONCURRING OPINION

The undersigned Board Member respectfully dissents. Because claimant's work did not put her at any increased risk of injury, I do not agree her injury was work-related. However, I concur that the case is compensable because claimant's accidental injury arose out of a neutral risk.

Unfortunately, we lack clear statutory directive in how to address these scenarios. We do not have statutory definitions of "arising out of employment" and "normal activities of day-to-day living." In place of well-defined statutes, we have judicially-created substitute rules. The rule from *Boeckmann* – that an injury from stooping down to pick up a tire at work was not compensable because it was no different from movements away from the job – does not seem to be rooted in statutory language. Our statutes say nothing about the direct and natural result rule enunciated in *Jackson*. Examining cases based on employment, personal and neutral risks, as in *Hensley*, is not statutorily based.

The most recent standard set forth in *Bryant* is not based in statute, but is instead based on Larson's. *Bryant* plainly states no bright-line rule is clear from the language of K.S.A. 2009 Supp. 44-508(e).[67] Perhaps this is why the *Bryant* decision relies on legal treatises and public policy, instead of following the more dominant trend of trying to glean the legislature's intent based on what a statute says and avoiding public policy and deciphering the law based on Larson's.[68, 69]

---

[67] See 292 Kan. at 595.

[68] See *Douglas v. Ad Astra Information Systems, L.L.C.*, 296 Kan. 552, 561, 293 P.3d 723 (2013).

[69] See *Fernandez v. McDonald's*, 296 Kan. 472, 477, 292 P.3d 311 (2013); see also *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 607-08, 610, 214 P.3d 676 (2009); *Hall v. Knoll Bldg. Maint., Inc.*, 48 Kan. App. 2d 145, 153, 285 P.3d 383 (2012).

Bryant instructs us to rely on a generalized overview of workers compensation theory contained on page five of the multi-volume treatise Larson's Workers' Compensation Law and ask, "Was there a work-connected injury?" and to not look at the worker's personal fault, but to explore whether there was an injurious event relating to employment. The language quoted from Larson's is from §1.03 "Compensation Contrasted with Tort" and subsection [1] titled "The Test of Liability: Work Connection Versus Fault." Such section instructs us that negligence and fault do not affect the right to workers compensation benefits. Such section does not address the Kansas Legislature's meaning of "arising out of employment" and does not

I do not think it is necessary to explore public policy and/or legal treatises in this case because going up stairs once or twice or even a few times per day at work – as opposed to an increased employment risk from frequently being on stairs or something particular about the stairs at work that makes them more of a hazard than stairs in normal every day life – is a normal activity of day-to-day living.

Moreover, while the Board has a duty to follow *Bryant*, I do not find clear directive therein. Along these lines, both parties cited *Bryant* as supporting their arguments. This may be understandable because *Bryant* may allow a case to be both compensable *and* not compensable. For example, *Bryant* states the "proper approach" is to examine whether an injury occurred as a "consequence of . . . life's ongoing daily activities, such as . . . walking in ways that were not peculiar to the job, or as a consequence of an event . . . specific to the requirements of performing one's job." The answer to both questions in this case is "yes." Claimant testified that when she was injured in 2009, she was not walking the steps or pivoting in any way peculiar to her job.[70] Seemingly, the activity would then be viewed as one of day-to-day living and her injury did not arise out of her employment. However, she also had to negotiate the stairs to get to her work station. Do we now have a work requirement that would be compensable?

Bryant also instructs us to not look at isolated movements, such as walking, but to look at the overall context of what the worker was doing when injured – was the activity resulting in injury connected to or inherent in performing the job? Claimant was walking to get to her work area, but she was also walking in a manner not peculiar to her job, just like she would do anywhere else. While the Kansas Supreme Court in *Bryant* noted the Kansas Court of Appeals unpublished ruling in that case removed from workers compensation protection many work-related injuries that may occur both at work and away from work, I cannot figure out what K.S.A. 2009 Supp. 44-508(e) is meant to exclude. The plain language of the statute says nothing about normal activities of day-to-day living being compensable if they are work-connected or if the activity is performed in the context of performing work. Arguably anything done at work is "work-connected," but that really only addresses the "in the course of employment" requirement, not the "arising out of employment" requirement. K.S.A. 2009 Supp. 44-508(e) is meaningless if it precludes nothing.

---

address limits to compensability contained in K.S.A. 2009 Supp. 44-508(e). The issue in this case does not address distinctions between negligence and workers compensation, but rather the meaning of the Kansas Legislature's intent to exclude compensability for injuries due to normal activities of day-to-day living.

Bryant also refers to the public policy or "social obligation" of shifting the responsibility of paying for injuries from workers to respondents because a worker may not be able to establish actionable negligence on the part of the employer. How this commentary answers what sort of injury is excluded from compensability as an activity of day-to-day living is unknown to this Board Member. Generalized public policy regarding why we have workers compensation in place of common law tort actions does not address the meaning of K.S.A. 2009 Supp. 44-508(e).

[70] See R.H. Trans. at 25.

Instead of looking at what may be compensable, perhaps the focus should be on what the Kansas Legislature meant to exclude from compensability when it enacted K.S.A. 44-508(e). These may be different sides of the same coin, but the Legislature meant to exclude from compensability injuries and activities resulting from normal activity of day-to-day living. Again, is minimal stair negotiation performed at work somehow not an activity of day-to-day living simply because it is performed at work?

While *Bryant* does not employ risk analysis,[71] this Board Member agrees with the late Judge Greene that, "A fair reading of our caselaw reveals that the test is to determine whether the injury was 'fairly traceable to the employment and not coming from a hazard to which the workman would have been equally exposed apart from the employment.'"[72]

In analyzing personal risks, employment risks and neutral risks, this Board Member agrees there was insufficient evidence to prove claimant's 2009 left ankle injury was a direct and natural consequence of her 2005 left ankle injury. Her latter accident was not due to a personal risk.

This Board Member does not view claimant ascending stairs as a risk of employment. The facts of this case are not like *Poff*, *Anderson* or *Heller*, where the frequency of a worker's duties truly remove the act from what would otherwise be an activity of daily living. While the record contains no information regarding the number of times claimant ascends stairs outside of work on a daily basis, claimant testified she negotiated similar stairs more than hundreds of times in her life. Claimant's walking and pivoting up stairs once or twice per day at work did not expose her to a greater hazard or risk than to what she was otherwise exposed in her normal day-to-day living.[73] The mere happenstance that claimant's left ankle injury occurred at work due to the routine act of pivoting while walking up stairs does not change an activity of daily living into a compensable work event. Claimant was not injured *because* she was at work as opposed to becoming injured merely *while* she was at work. If ascending stairs once or twice to get to a desk is an employment-related risk or hazard, however *de minimis*, respondent is acting as an absolute insurer for whatever occurs under its roof.

---

[71] This risk analysis approach was not used in *Bryant* even though Mr. Bryant had what the Court of Appeals called a "highly unstable lower back" that caused his injury. *Bryant v. Midwest Staff Solutions*, No. 99,913, 2009 WL 744160 at *5 (Kansas Court of Appeals unpublished opinion filed Mar. 13, 2009), *rev'd,* 292 Kan. 585, 257 P.3d 255 (2011).

[72] *McCready v. Payless Shoesource*, 41 Kan. App. 2d 79, 96, 200 P.3d 479 (2009) (Greene, J., dissenting). Such cases basically mirror the cases referenced in *Bryant*.

[73] "The act of [using] a staircase at work, in and of itself, does not present a greater risk than that faced by the general public; however, when an employee is required to use the stairs more frequently than a member of the general public, she faces an increased risk of injury." *Rio All Suite Hotel and Casino v. Phillips*, 126 Nev. Adv. Op. 34, 240 P.3d 2, 7, *r,hg denied* (2010); see also *Nascote Industries v. Industrial Com'n*, 353 Ill. App. 3d 1056, 289 Ill.Dec. 755, 820 N.E. 2d 531, 535 (2004) and 1 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law, § 3.03 at 3-4.1 to 3-5.

This Board Member does not view claimant's injury as being due to a personal risk or an employment risk. Neither party provides any neutral risk analysis, but I conclude claimant's injury was due to a neutral risk, as was the injury in *McCready*.[74] Ms. McCready turned to take a step on her employer's sidewalk and fell. The condition of the sidewalk had nothing to do with her fall. Ms. McCready testified she did not know why she fell. "This was a neutral risk. Neither party could explain the reason for McCready's fall. . . . [G]iving deference to the Board's view of the facts, her disability does not arise from some personal condition. The risk should therefore be borne by [the employer] . . . ."[75] Here, claimant pivoting and shifting her weight to her left foot while ascending stairs is not appreciably different than McCready's turning to take a step. While claimant, unlike Ms. McCready, did not testify she did not know why her injury happened, such factor seems insignificant because the evidence still does not explain *why* she fell.

Claimant's injury was not due to an employment risk and there is insufficient evidence her injury was on account of her preexisting and personal ankle condition. By default, this leaves the risk claimant encountered by maneuvering stairs to be a neutral risk.[76] While I think the Board strains to define claimant's accidental injury as arising out of her employment and rooted in her job duties, I would nonetheless concur in reaching the same result that the case is compensable because I view claimant's injury as being due to a neutral risk. Based on pre-May 15, 2011 law and *McCready*, accidental injuries from neutral risks are compensable.

_____
BOARD MEMBER

[74] "Falling while traversing stairs is a neutral risk, and the injuries resulting therefrom generally do not arise out of employment." *Village of Villa Park v. Illinois Workers' Compensation Com'n*, 3 N.E. 3d 885, 890, 378 Ill.Dec. 320, 325 (2013), *r'hg denied* (2014).

[75] *McCready*, 41 Kan. App. 2d at 92.

[76] See *City of Brighton v. Rodriguez*, ___ Colo. ___, 318 P.3d 496, 504 (2014) (Because an unexplained fall down stairs was neither due to a personal or an employment risk, it was due to a neutral risk).